Then comes section 5 which reads as follows:—

"5. The procedure and powers of the Court, under its jurisdiction in Bankruptcy shall:

(a) in the Settlements be the same as under the existing laws of the Straits Settlements; and

(b) in the Malay States be the same as under the existing laws of the Federated Malay States."

The disappearance of the Malayan Union and the creation of the Federation does not affect the statutory position in any material way and I would now proceed to summarise the present position in the former Federated Malay States as follows:—

This Court has jurisdiction throughout the Federation. In the former F.M.S., however, the law to be applied is the former F.M.S. Enactment (Cap. 55) subject to certain modifications which do not affect the argument, and in the former F.M.S. the procedure and powers of the Court are the same as under that Enactment. Similarly in the Settlements of Penang and Malacca the law to be applied is the former Colony Ordinance (Cap. 45) and the procedure and powers of the Court are the same as under that Ordinance. There is nothing in the F.M.S. Enactment which makes what I have called a Colony statutory debtor subject to it and there is nothing in it which gives the Court powers to entertain bankruptcy proceedings against such a debtor except of course in the case where he is also an F.M.S. statutory debtor. In the F.M.S. the Court only has jurisdiction, in the sense of power, in the case of an F.M.S. statutory debtor.

That position is not to my mind affected in any way by anything in section 4 of Malayan Union Ordinance No. 16 of 1946, for as I have pointed out that section only says which Court is to have jurisdiction and without saying what that jurisdiction is deals with the way in which it is to be exercised. It is true that sub-section enables proceedings to be transferred from a State to a Settlement or *vice versa*, but that provision as I have said is ancillary to the earlier provisions of the section and would seem only to apply in the case, the possibility of which has already been mentioned, where one and the same person is both an F.M.S. statutory debtor and a Colony statutory debtor. To rely on that sub-section alone to give the Court in the former F.M.S. jurisdiction in relation to a Colony statutory debtor as if he were an F.M.S. statutory debtor would be to disregard the preceding sub-sections of the same section and to give it a construction in flagrant contradiction of the express terms of section 3 and section 5.

In the present case it is admitted that the debtor is not an F.M.S. statutory debtor and it follows that this Court sitting in Perak has no jurisdiction over her in bankruptcy.

That concludes the matter and it is not strictly necessary for me to deal with the question of service in Penang without leave of the Court. In case, however, the point should arise again I feel I should express my opinion that had the Notice not been itself for the reasons I have stated a nullity leave for service would probably not have been necessary by reason of sections 5(2) and 109 of the Courts Ordinance.

In the circumstances, there will be an order against the creditor for payment of the debtor's costs which I assess at $100.

Solicitors for the judgment-debtor: *Das & Co.*

Solicitor for the judgment-creditor: *M. S. Mahendran.*

CHUNG GUAT HOOI (m.w.) v. G. H. GOH.

[A. C. J. (Spenser Wilkinson, J.) April 29, 1954]

[Penang — Rent Assessment Board Reference No. 2 of 1954]

Landlord and tenant — Control of Rent Ordinance, 1948, s. 13(1)(f) — Res judicata — Whether applicable to Rent Assessment Board orders — Discontinuance in earlier proceedings.

The applicant had applied to the Rent Assessment Board for leave to eject the respondent under section 13(1)(f) of the Control of Rent Ordinance, 1948. After filing of the defence by the respondent, the applicant filed a notice of discontinuance and the application was struck off. But over 6 months later she filed a fresh application on the same grounds and with the additional ground of alternative accomodation offered. The respondent pleaded the defence of res judicata under the provisions of O. 16, r. 3 of the Subordinate Courts Rules. On a reference to the High Court in a case stated by the President of the Board, —

Held: (1) the doctrine of res judicata cannot be invoked if the issue between the parties in the second proceedings is not substantially the same as that in the first proceedings. Proceedings before a Rent Assessment Board are quite different in essence from proceedings between parties before a Court. The Board makes no final determination of any question. It can only give permission to commence proceedings; (2) even assuming that the doctrine could be applied, there are few cases under the Control of Rent Ordinance in which the doctrine is applicable because the circumstances between landlord and tenant are constantly changing, particularly so under section 13(1)(f).

Cases referred to:—

(1) *In re May* 28 Ch. D. 316.

(2) *Teh Say Mooi v. Tan Chor Leng* (1950) M.L.J. 90.

(3) *R. S. Mohamed Sultan v. Liak Jee Song* (1952) M.L.J. 171.

(4) *Clarke v. Bradlaugh* 8 Q.B.D. 63.

CASE STATED.

Lim Kheng Kooi for the applicant.

Eusoffe Abdoolcader for the respondent.

Cur. Adv. Vult.

Spenser Wilkinson, J. : — This was a case stated by the President of the Rent Assessment Board under the provisions of section 10 of the Control of Rent Ordinance, 1948. The point of law for decision was whether the defence of *res judicata* as provided for in Order 16 rule 3 of the Subordinate Courts Rules applied to the present application before the Board. The actual question as put by the President of the Board in the case stated reads as follows :—

"Does the defence of 'res judicata' properly apply in this case, and if so, does it constitute a bar to any further proceedings before the Board in respect of the same premises while owned by the same applicant and occupied by the same respondent."

The applicant had applied in Application No. 14 of 1953 on the 24th March, 1953 for leave to eject the respondent from No. 14, Scott Road, Penang under the provisions of section 13(1)(f) of the Control of Rent Ordinance, 1948 on the ground that she required the premises for her own use. A defence to this application was filed on the 22nd April, 1953 and the case was fixed for hearing on the 16th July, 1953, but on the 13th July, 1953 the applicant filed a Notice of Discontinuance with the result that on the 16th July, 1953 the Board ordered that the application be struck out with costs.

A fresh application was made by the applicant in February, 1954 on substantially the same grounds as the first application, though in her grounds of application there was now an additional allegation that the applicant had from time to time offered to the respondent suitable alternative accommodation, which offers had not been accepted.

It was submitted by Mr. Abdoolcader on behalf of the respondent that under the provisions of Order 16 rule 3 of the Subordinate Courts Rules which were applied to proceedings before the Rent Assessment Board by the Rent Assessment Boards (Penang and Province Wellesley) Rules, 1948, Rule 5 of which reads as follows :—

"5. Subject to the provisions of the Ordinance and to these Rules, the District Court Rules shall, with any necessary modifications, apply to applications to the Board and to summonses and notices issued by the Board."

Order 16 rule 3 of the Subordinate Court Rules reads as follows :—

"3. Withdrawal shall afford a defence by way of res judicata to subsequent proceedings unless —

(a) it occurred before the filing of the defence, or, if no defence is filed, before the trial or hearing of the proceedings, or

(b) the Court has granted leave to institute fresh proceedings.

It was argued by Mr. Abdoolcader on behalf of the respondent that the effect of this Rule is that where a Notice of Discontinuance is filed after the filing of the defence no subsequent proceedings can be brought unless the Court has granted leave to institute fresh proceedings and he relied on the case of *In re May*[1].

In my opinion the use of the expression "by way of *res judicata*" in Rule 3 indicates that such a defence can only be raised in those cases where the well-known doctrine of *res judicata* applies. This doctrine is clearly explained in the judgment of Brett, M.R. in the case of *In re May*[1] in the following words :—

"The doctrine of res judicata is not a technical doctrine applicable only to records. It is a very substantial doctrine, and it is one of the most fundamental doctrines of all Courts that there must be an end of litigation, and that the parties have no right of their own accord, after having tried a question between them and obtained a decision of a Court, to start that litigation over again on precisely the same questions. Therefore this was a judgment, and, if there was nothing else the existence of the first judgment, would be a bar to the new litigation upon precisely the same point between the parties."

I think the important part of this passage is the use of the expressions "precisely the same questions" and "precisely the same point". The doctrine of *res judicata* cannot be invoked if the issue between the parties in the second proceedings is not substantially the same issue as that in the first proceedings and I do not think that the intention of Rule 3 is to alter this principle. In my opinion the effect of the Rule is to put the determination of a suit or proceeding by way of withdrawal upon the same basis as the determination of a suit by judgment. Whether the first case is actually determined or merely withdrawn if the plaintiff or applicant can show that in his second suit different considerations arise from those which have been decided or raised in the first then the earlier proceedings are not a bar to the later proceedings.

Proceedings before a Rent Board are quite different in essence from proceedings between parties before a court. The Board makes no final determination of any question. All it can do is to give permission to the applicant to commence proceedings. In the case of *Teh Say Moci v. Tan Chor Leng*[2] Hill, J. said :—

"Secondly, the Board is not making any order. It merely records a decision to give or not to give permission."

I am in considerable doubt as to whether the doctrine of *res judicata* can be applied at all to proceedings in which all that can be asked for or obtained is permission to bring proceedings. Even assuming, however, that the doctrine could be so

applied there are in my opinion few cases under the Control of Rent Ordinance in which the doctrine is applicable because the circumstances as between landlord and tenant are constantly changing. The application in the present case was based on the provisions of paragraph (f) of section 13(1) of the Ordinance. Under that paragraph four matters have to be considered:—

(1) Whether the owner of the premises reasonably requires the same for his own occupation;
(2) Whether there has been a change by purchase in the ownership since February, 1952, or the tenancy has been determined by not less than one year's notice to quit and there has been no change of ownership within the previous year;
(3) The question whether other accommodation is available for the owner or the tenant; and
(4) The balance of hardship between the parties.

Of these four points the second may for the purposes of the present discussion be looked upon as fixed, because once the notice to quit has been given and expired the contractual tenancy is determined. But all the other three points are in their nature variable. At one time the requirement of the landlord for occupation by himself or his family might be unreasonable but at a later stage it might have become reasonable; alternative accommodation might be available at one time but not at another; and the balance of hardship may vary from time to time. If during the six months which elapsed between the withdrawal of the first application and the commencement of the second the situation had changed in any of the above respects, then it seems to me that it is not a question of attempting to bring fresh evidence to support a claim which has already been adjudicated upon but a question of giving evidence regarding a new state of affairs. I find some support for this view in the judgment of Buhagiar, J. in the case of *R. S. Mohamed Sultan v. Liak Jee Song*[3] at page 173, where in considering the question of *res judicata* in a landlord and tenant case he said:—

"But apart from this I consider that there may be changes of circumstances from year to year independent of the conduct or will of the landlord or tenant which may make it reasonable that an order or judgment be made or given for recovery of possession of premises."

Mr. Abdoolcader urged upon me that the whole principle upon which *res judicata* is based is that there must be an end to litigation and that if I were to construe Order 16 rule 3 as not creating a bar to a second suit in a case like the present there would be no end to litigation. This point was also dealt with in the same judgment of Buhagiar, J. where he said:—

"I think it would not be logical to hold that once a landlord has lost a suit in which he asked for the recovery of premises he may never at any later date bring a new suit for such recovery. A landlord who without fresh grounds keeps on bringing suits year after year for the recovery of possession would of course be liable to have his suits dismissed as being vexatious litigation."

With respect I agree, but would add that the rather curious provision of our law which makes it necessary to apply for permission to the Board before bringing a suit is in itself a sufficient safeguard against vexatious suits being brought at all.

In my opinion, therefore, the plea of *res judicata* can only be raised where the issues to be decided in the second proceeding are precisely the same as those in the first and this will seldom be the case in applications based upon section 13(1)(f) of the Control of Rent Ordinance. In the particular case before me I think the issues in the second application were different and the plea of *res judicata*, therefore, fails.

During the original argument before me I was under the impression that the Rent Assessment Boards Rules cited earlier in this judgment referred in terms to the Subordinate Court Rules. Having observed subsequently that they refer in terms to the District Court Rules I heard further argument as to whether, the District Court Rules having been repealed, the reference in the Rent Assessment Boards Rules to the District Court Rules is now to be read as a reference to the Subordinate Courts Rules; or whether the District Court Rules (although repealed) still apply to Rent Assessment Board cases. The answer to this question depends upon whether section 12 of the Interpretation and General Clauses Ordinance, 1948 applies or whether one ought to apply the rule stated by Brett, L.J. in *Clarke v. Bradlaugh*[4] as follows:—

"There is a rule of construction that where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third statute does not affect the second."

The whole question really turns upon whether the District Court Rules can be said to have been repealed and re-enacted. I must confess to some doubt as to whether the Rules Committee had power under section 10(1) of the Rules Committee Ordinance, 1948 to repeal the District Court Rules except in so far as they affected the Sessions and Magistrates' Courts, because these were the only matters in respect of which the new Rules were made. It might be argued, therefore, that the purported repeal of the District Court Rules did not repeal them in so far as they were incorporated in the Rent Assessment Boards Rules.

I also have some doubt as to whether the Subordinate Courts Rules, which enact an entirely new code of procedure for what were in effect new Courts, can be said to be a re-enactment of the District Court Rules, which were Rules for the District Courts of the Settlements only.

After hearing the further argument I have come to the conclusion, though not without all doubt, that as regards this Settlement the District Court Rules can be said to have been repealed and re-enacted by the Subordinate Courts Rules, and if this be so, then I think section 12 of the Interpretation and General Clauses Ordinance must be applied.

I would, however, draw the attention of the rule making authority (which, if the Rent Assessment Board is a Subordinate Court, is now the Rules Committee) to the fact that a somewhat lengthy body of rules designed essentially for the disposal of suits in civil Courts has been applied to proceedings before a Board, whose only function (at least in regard to ejectment cases) is to give permission for proceedings in Court to be brought. I think the point raised in the present proceedings before me illustrates the unsuitability of the Subordinate Courts Rules to proceedings before a Rent Board and indicates the advisability of more suitable rules for Rent Assessment Board cases being drawn up.

My answer to the question raised by the Board in this case is that the defence of *res judicata* does not apply in this case and does not constitute a bar to the further proceedings sought to be brought before the Board by the applicant.

Order accordingly.

Solicitor for the applicant: *Lim Kheng Kooi.*
Solicitor for the respondent: *Ong Huck Lim.*

HARDIAL SINGH v. HARBANS SINGH.

[C. A. (Mathew, C.J., Abbott & Thomson, JJ.) April, 15, 1954]

[K. L. — Civil Appeal No. 43 of 1953]

Land Code (Cap. 138), ss. 129, 138 & 139 — Charge — Notice of demand — Form of.

Where money secured by charge is payable by demand the proper Form of Charge is that given in Schedule XXIV(c) and not XXIV(a). If the Form in Schedule XXIV(a) is used then when the default is made in payment the Notice of Demand must comply with the requirement of section 138 of the Land Code.

Case referred to:—

(1) *R. M. S. T. Somasundram Chetty v. Ng Sin Yan* (1923), 3 F.M.S.L.R. 205.

CIVIL APPEAL.

B. J. P. Joaquim and *M. N. Cumarasami* for the appellant.

F. G. Charlesworth and *Marsh* for the respondent.

The facts and arguments appear sufficiently from the judgment of Mathew, C.J., with which Abbott and Thomson, JJ. concurred.

Cur. Adv. Vult.

Mathew, C.J. : — On the 6th of November, 1951, the respondent, in consideration of the sum of $170,000 lent to him by the appellant, executed a memorandum of charge in favour of the appellant over the respondent's undivided one-third share in a piece of land in Kuala Lumpur. The fourth clause to that memorandum of charge reads :—

"Fourthly that if at any time interest shall be in arrear for more than three (3) months then the whole sum of dollars one hundred and seventy thousand ($170,000) or so much thereof as shall for the time being remain unpaid with interest thereon shall immediately become due and payable and the Chargee shall thereupon be entitled to all".

The monthly interest on the loan was $850. On 9th June, 1952, a cheque drawn by the respondent in respect of the March 1952 instalment was dishonoured, and on the 21st June the appellant served notice on the respondent in the following terms :—

Singapore,
21st June 1952.

Mr. Harbans Singh son of Jagat Singh,
c/o Messrs. Jagat Singh & Sons,
59 Batu Road, Kuala Lumpur.

NOTICE UNDER SECTION 138 OF THE LAND CODE.

You have made default in the payment of interest due under the charge executed by you in my favour on the 6th day of November 1951, on your one-third share of land held under Selangor Certificate of Title No. 4744 Lot No. 291 of section 46 in the town of Kuala Lumpur.

This is to give you notice that you shall pay to me the sum of $170,000 being the principal sum due under the said charge and all interest due thereon, within a period of thirty-five (35) days from the date of receipt hereof and that I will resort to all remedies competent unless this notice is complied with.

Sd. HARDIAL SINGH,
Chargee.

On the 4th October, 1952, the appellant took out an Originating Summons requiring the respondent to show cause why his interest on the property in question should not be sold by public auction. On 29th October 1952 the application made by the Originating Summons was dismissed for reasons which do not require consideration here, as the main basis of the appeal rests on other grounds which were not argued before the learned trial judge.

No evidence was called, and the many issues which were required to be decided were by agreement between Counsel put on one side. The learned trial judge was only required to decide whether he would make the order asked for, on the assumption that all the facts in the appellant's affidavit of 27th September, 1952, were correct. Apart from the issues of fact which the